

INDEX

	Page
I. Introduction	2
II. Where discrimination is based on an employee's union membership, activity, or want of either, and encouragement or discouragement of union membership is reasonably inferable, Section 8(a)(3) is violated whether or not the discrimination is motivated by a desire to encourage or discourage membership	5
III. In any event, a purpose to encourage membership in a labor organization was established in <i>Radio Officers and Teamsters</i>	13
A. In both cases the labor organizations had the purpose of encouraging membership in good standing	13
B. Enforcement of an agreement conditioning employment on union membership, when the action taken is in excess of that permitted by the agreement, constitutes a violation of Section 8(a)(3) and 8(b)(2) without a showing that the individual act of enforcement had the specific purpose of encouraging membership	16
IV. In <i>Radio Officers and Teamsters</i> , even if the labor organizations did not violate Section 8(b)(2), the conduct in which they engaged nevertheless violated Section 8 (b) (1)(A)	19
Conclusion	25

CITATIONS

Cases:

<i>Acme Mattress Co., Inc.</i> , 91 NLRB 1010, enforced, 192 F. 2d 524	11
<i>Cusano v. National Labor Relations Board</i> , 190 F. 2d 898	3, 11
<i>Eichleay Corp. v. National Labor Relations Board</i> , 32 LRRM 2628	8, 16, 17
<i>Jersey Coast News Company, Inc.</i> , 105 NLRB No. 45, 32 LRRM 1278	4
<i>Morissette v. United States</i> , 342 U.S. 246	6
<i>National Labor Relations Board v. Bell Aircraft Corp.</i> , 32 LRRM 2550	14
<i>National Labor Relations Board v. Gluek Brewing Co.</i> , 144 F. 2d 847	10, 16
<i>National Labor Relations Board v. Hearst Publications</i> , 322 U.S. 111	10
<i>National Labor Relations Board v. Illinois Tool Works</i> , 153 F. 2d 811	25
<i>National Labor Relations Board v. Jarka Corporation</i> , 198 F. 2d 618	9

Cases—Continued

	Page
<i>National Labor Relations Board v. F. H. McGraw & Co.</i> , 32 LRRM 2220	8, 17
<i>National Labor Relations Board v. Newport News Ship- building & Dry Dock Co.</i> , 308 U.S. 241	25
<i>National Labor Relations Board v. Newspaper & Mail Deliverers' Union</i> , 192 F. 2d 654	10
<i>National Labor Relations Board v. Oertel Brewing Co.</i> , 197 F. 2d 59	10
<i>National Labor Relations Board v. Pappas & Co.</i> , 203 F. 2d 569	10
<i>National Labor Relations Board v. Geo. W. Reed, et al.</i> , 32 LRRM 2308	20-23
<i>National Labor Relations Board v. Swinerton</i> , 202 F. 2d 511, certiorari applied for by respondent, No. 72, October Term, 1953	8
<i>National Labor Relations Board v. Whitin Machine Works</i> , 204 F. 2d 883	2
<i>Red Star Express v. National Labor Relations Board</i> , 196 F. 2d 78	17
<i>Republic Aviation Corporation v. National Labor Rela- tions Board</i> , 324 U.S. 793	23, 24
<i>Salt River Valley Water Users' Association v. National Labor Relations Board</i> , 32 LRRM 2598	11
<i>Swift & Co. v. United States</i> , 196 U.S. 375	18
<i>United States v. Aluminum Company of America</i> , 148 F. 2d 416	18
<i>United States v. Socony-Vacuum Oil Company</i> , 310 U.S. 150	18
<i>Warehousemen's Union, Local 117 v. National Labor Re- lations Board</i> , 121 F. 2d 84, certiorari denied, 314 U.S. 674	18

Statutes:

<i>National Labor Relations Act (Act of July 1935, 49 Stat. 449, 29 U.S.C., 151, et seq.):</i>	
Section 8 (1)	25
Section 8 (3)	2, 17
<i>National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, et seq.):</i>	
Section 7	19
Section 8 (a) (1)	25
Section 8 (a) (3)	2, 4, 5, 6, 7, 9, 10, 12, 15, 17
Section 8 (b) (1) (A)	4, 19, 23
Section 8 (b) (2)	4, 12, 14, 15, 19

Miscellaneous:

H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21	9
H. Rep. No. 245, 80th Cong., 1st Sess.	13
S. Rep. No. 1184, 73rd Cong., 2d Sess., p. 6	9

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 5

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 6

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 7

GAYNOR NEWS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD ON REARGUMENT

On May 25, 1953, the Court ordered these cases restored to the docket for reargument. 345 U.S.

(1)

962. The National Labor Relations Board submits this supplemental brief to aid in the consideration of the issues common to the three cases.

I

Introduction

Section 8 (a) (3) of the amended National Labor Relations Act, like Section 8 (3) of the original Act, makes it an unfair labor practice for an employer "by discrimination in * * * employment * * * to encourage or discourage membership in any labor organization * * *." This provision is linked with Section 8 (b) (2) of the amended Act, which makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) * * *."

In the Board's original briefs, the position taken is that a violation of Section 8 (a) (3) is established when it is shown (1) that the action directed against the employee constitutes discrimination in employment, and (2) that it is reasonably inferable from the character of the discrimination that its tendency is to encourage or discourage union membership.¹ In *Radio Officers*, the dis-

¹ Recently, in *National Labor Relations Board v. Whittin Machine Works*, 204 F. 2d 883, 884-885 (C.A. 1), the Court of Appeals for the First Circuit, dealing with an unlawful discharge for union activity, formulated the elements of the offense in the following terms:

When a charge is made that by firing an employee the employer has exceeded the lawful limits of his right to manage and to discipline, substantial evidence must be adduced to support at least three points. First, it must be shown that the employer knew that the employee was

crimination practiced was the refusal to clear an employee for employment with the Company because of the employee's failure to adhere to the system of hiring prescribed by the Union's rules; in *Teamsters*, the discrimination practiced was the reduction of an employee's seniority because of delinquency in the payment of dues to the labor organization where no valid union-security agreement was in effect authorizing compulsory dues payment; in *Gaynor*, the discrimination practiced was withholding wage and vacation benefits from nonmembers of the labor organization, solely because of their status as nonmembers, while granting these benefits to union members who, except for their membership status, were in the same position as the nonmembers. In each case it was reasonably inferable that the discrimination tended to encourage union membership; in all three cases employees would be encouraged to acquire or retain union membership, and in *Radio Officers* and *Teamsters* employees would in addition be encouraged to maintain their membership in good standing. Finally, the elements of discrimi-

engaging in some activity protected by the Act. Second, it must be shown that the employee was discharged because he had engaged in a protected activity. [Citations] Third, it must be shown that the discharge had the effect of encouraging or discouraging membership in a labor organization. [Citation] The first and second points constitute discrimination and the practically automatic inference as to the third point results in a violation of § 8 (a) (3). See *National Labor Relations Board v. Gaynor News Co.*, 197 F. 2d 719, 722 (2 Cir. 1952), cert. granted 345 U.S. 902 (1953); But cf. *National Labor Rel. Bd. v. Reliable Newspaper Del.*, 187 F. 2d 547 (3 Cir. 1951).

As to the quantum of knowledge the employer must have, see *Cusano v. National Labor Relations Board*, 190 F. 2d 898, 902-903 (C.A. 3).

nation and its union-encouraging tendency having been established, we sought to show in *Gaynor* that it was immaterial that the Company guilty of the discrimination did not have as its purpose the encouragement of union membership. (Bd. brief in *Gaynor*, pp. 24-33.)

This brief will not treat, except incidentally, with the factors of discrimination and its union-encouraging tendency² as exemplified in these cases. Instead, in this brief (1) we shall amplify our position that a purpose or desire to encourage or discourage membership need not be shown to establish a violation of Section 8(a)(3); (2) on the assumption that purpose is material, we shall show that this factor is present in *Radio Officers* and *Teamsters*; and (3) whatever the result in *Radio Officers* and *Teamsters* may be insofar as the violation of Section 8(b)(2) there found depends on the interpretation of Section 8(a)(3), we shall show that the conduct engaged in by the labor organizations in these cases is independently violative of Section 8(b)(1)(A).

² In *Gaynor*, petitioner contended that its discrimination was incapable of encouraging membership because the employees victimized by the discrimination were ineligible for membership in the labor organization. In rejecting this contention, the court below explained (R. 125): "A union's internal politics are by no means static; changes in union entrance rules may come at any time. If and when the barriers are let down, among the new and now successful applicants will almost surely be large groups of workers previously 'encouraged' by the employer's illegal discrimination." This observation has since proved correct. In 1952, the Union changed its admission policy and now admits to membership "all steady situation holders" (that is, persons regularly employed), and many employees previously ineligible have acquired membership. *Jersey Coast News Company, Inc.*, 105 NLRB No. 45, 32 LRRM 1278.

II

Where Discrimination Is Based on an Employee's Union Membership, Activity, or Want of Either, and Encouragement or Discouragement of Union Membership Is Reasonably Inferable, Section 8(a)(3) Is Violated Whether or Not the Discrimination Is Motivated By a Desire To Encourage or Discourage Membership

The language employed by Congress in Section 8(a)(3)—forbidding an employer “by discrimination in * * * employment * * * to encourage or discourage membership”—does not suggest that violations can occur only where the employer engaged in discrimination has as his purpose the encouragement or discouragement of membership. We have shown in our original briefs that where, as in these cases, discrimination against an employee is based solely and precisely on nonmembership in a union (or, what we believe is the same thing, failure to adhere to a membership rule which is requisite to maintenance of membership in good standing), the attraction of union membership is enhanced and membership is encouraged. Where this occurs, it does not matter that the reason for the discrimination—the motive or purpose of the employer effecting the discrimination—may not have been to encourage membership. The employer may be motivated by a union's threats or other pressure, or by some real or fancied economic necessity. The fact remains that the discrimination falls squarely within the statute, which makes it unlawful “by discrimination in * * * employment * * * to encourage or discourage membership in any labor organization * * *.”

Had Congress intended that a purpose to en-

courage or discourage membership be an essential element of the unfair labor practice in Section 8(a)(3), it would have been a simple matter to phrase the prohibition in unambiguous terms to make it unlawful "to discriminate in employment *in order* to encourage or discourage membership" or "*for the purpose of* encouraging or discouraging membership." However, instead of using the words "to encourage or discourage membership" as descriptive of the actor's subjective purpose, Congress used them to describe the *condition* which the actor was not to bring about, and forbade the creation of this condition "by discrimination in * * * employment." It is the fact of encouragement or discouragement by the forbidden means of discrimination which is relevant to Congress' aim.

We do not argue that, as a bare matter of language, the words Congress used could not be limited to cases where the party effecting the discrimination had as his purpose encouragement or discouragement of membership. But the language requires no such restriction, and the congressional objective argues decisively against it. Even where statutes define "public welfare offenses" to which criminal sanctions attach, the distinguishing characteristic of such enactments is that answerability for conduct abridging the protected interest is fixed without regard to "evil purpose or mental culpability," for the statutory offense "depend[s] on no mental element but consist[s] only of forbidden acts or omissions." *Morissette v. United States*, 342 U. S. 246, 252-253, and the discussion *passim*

pp. 252-260. *A fortiori*, under the remedial scheme of the National Labor Relations Act, one who engages in discrimination in employment which in fact encourages or discourages membership in a labor organization is guilty of the practice Congress proscribed whether or not it is his purpose or desire to effect such encouragement or discouragement.

The only substantial reason for introducing a purpose requirement would be a showing that it was necessary to prevent Section 8(a)(3) from reaching conduct outside the mischief at which Congress aimed. But no such showing is possible. It may be urged that many innocent acts can encourage or discourage union membership. A non-union employer's fair and generous labor policy may discourage membership in a labor organization aspiring to represent the employees, and a union's vigorous and impartial defense of the interests of all employees may encourage membership in it; yet it is obvious that neither situation was intended to fall within the ban of Section 8(a)(3). It is equally obvious, however, that there is no need to insert a purpose requirement to conclude that conduct of the type in question is not touched by Section 8(a)(3). For by its terms the only condition of union encouragement or discouragement which the section prohibits is that which is effected "by discrimination in * * * employment." It is never enough in establishing a violation to show conduct which encourages or discourages union membership; it is essential to show that the conduct constitutes "discrimination in employment." Nor are

we concerned with discriminatory employment practices at large; the discrimination must be of a type which puts an employee at a disadvantage in some incident of employment by virtue of his union membership, activity, or want of either. Inquiry centered on whether conduct is discriminatory in this sense provides a realistic basis for determining whether or not it is within the evil apprehended by Congress.³

Accordingly, in each of the present cases, to determine whether the action encouraging union membership was unlawful, the critical issue is whether the encouragement resulted from the kind of discrimination in employment Congress sought to reach in Section 8(a)(3). We have shown in *Radio Officers* that the closed-shop system of hiring there involved, restricting employment to union members, was specifically outlawed by Congress in the amended Act, and that the discrimination based on that system was within the evil Congress condemned. (Bd. brief in *Radio Officers*, pp. 21-26, 38-44).⁴ Similarly, the discrimination in *Teamsters* was squarely denounced by Congress when it provided that control over employment to compel

³ As explained in the Board's brief in *Gaynor* (pp. 30-33), purpose may be relevant in determining whether an act is discriminatory. For example, where the issue is whether an employee has been discharged because of poor production or because of union activity, it is necessary to determine whether the employer's purpose was to maintain efficiency (in which case the discharge is not discriminatory), or whether the employer's purpose was to defeat union activity (in which case the discharge is discriminatory).

⁴ See also, *National Labor Relations Board v. F. H. McGraw & Co.*, 32 LRRM 2220 (C.A. 6, June 4, 1953); *National Labor Relations Board v. Swinerton*, 202 F. 2d 511 (C.A. 9), certiorari applied for by respondent, No. 72, October Term, 1953; *Eichleay Corp. v. National Labor Relations Board*, 32 LRRM 2628 (C.A. 3, August 26, 1953).

union dues payment could be exercised only pursuant to a valid union-security agreement. (Bd. brief in *Teamsters*, pp. 13-26.)⁵ And in *Gaynor*, the discrimination practiced was precisely that envisaged by the House Report on the original Act when it stated that "agreements more favorable to the majority than to the minority are impossible, for under section 8(3) any discrimination is outlawed which tends to 'encourage or discourage membership in any labor organization.' " H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21. The Senate Labor Committee expressed the same view when it explained the reach of an earlier but virtually identical version of Section 8(3) of the Wagner Act;⁶ after first stating that an employer "ought not to be free" to discharge or refuse to hire an employee because of his union membership, it went on to say (S. Rep. No. 1184, 73d Cong., 2d Sess., p. 6):

Nor should an employer be free to pay a man a higher or lower wage solely because of his membership or nonmembership in a labor organization. The language of the bill creates safeguards against these possible dangers.

As exemplified by the present cases, therefore, Section 8(a) (3) is confined to Congress' objective without reading into it a requirement of showing a purpose or desire to encourage or discourage

⁵ See also, *National Labor Relations Board v. Jarka Corporation*, 198 F. 2d 618 (C.A. 3) (it is an unfair labor practice to fail to clear for employment "a union member delinquent in the payment of his dues" (p. 619) pursuant to a "practice of 'securing' preferential hiring for union men in good standing" (p. 620)).

⁶ See Bd. brief in *Gaynor*, p. 15, n. 9.

membership. For the fact of encouragement does not alone suffice to establish a violation; it must be the consequence of "discrimination in employment," and this crucial term acquires its meaning and its limitations from "the mischief to be corrected and the end to be attained." *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 124.

We think it clear, in short, that the absence of a showing of a purpose or desire to encourage or discourage union membership does not leave the reach of Section 8(a)(3) at large. On the other hand, insistence upon such a showing would hobble its effectiveness. For example, it is settled that an employer violates Section 8(a)(3) even if he does not intend the union-encouraging or discouraging effect of his discrimination but instead acts only under the pressure of economic hardship.⁷ Yet this rule could not have evolved if a union-encouraging or discouraging purpose were abstracted from Section 8(a)(3) as a controlling circumstance. The rule came into being because the issue was not conceived as one of culpable versus innocent intent; rather, it was conceived as a question of accommodating competing interests, and the employee's statutory interest in being free from discrimination was held superior to the employer's plea for

⁷ *National Labor Relations Board v. Gluek Brewing Co.*, 144 F. 2d 847, 853-854 (C.A. 8), and cases cited. For recent illustrations, see *National Labor Relations Board v. Newspaper & Mail Deliverers' Union*, 192 F. 2d 654, 656 (C.A. 2); *National Labor Relations Board v. Oertel Brewing Co.*, 197 F. 2d 59, 62 (C.A. 6); *National Labor Relations Board v. Pappas & Co.*, 203 F. 2d 569, 570 (C.A. 9).

immunity based on the exigency of his situation.⁸

The *Gaynor* case, we think, aptly illustrates the unrealistic consequences of the contrary view—that, regardless of discrimination based on union membership alone, and regardless of whether the result in fact is encouragement of membership, the employer should be immune unless he sought or desired to effect such encouragement. The Company contends that it should not be held responsible for the union-encouraging effect of its discrimination against nonmembers, solely (it is conceded) because of their nonmembership; it argues that it was indifferent to the union-encouraging effect of

⁸ See *Acme Mattress Co., Inc.*, 91 NLRB 1010, 1015-1017, enforced, 192 F. 2d 524, 528 (C.A. 7).

Compare the analogous accommodation illustrated by *Cusano v. National Labor Relations Board*, 190 F. 2d 898, 902-903 (C.A. 3):

Petitioner [the employer] urges as an alternative argument that whether or not a discharged employee actually * * * [engaged in misconduct in the course of participating in protected activity] is irrelevant so long as the employer reasonably believes he did and so long as the employer actually discharges the employee on the strength of that belief. It is true that an employer may discharge an employee for a good reason, a bad reason, or no reason at all. *N.L.R.B. v. Condenser Corp.*, 3 Cir., 1942, 128 F. 2d 67, 75; *N.L.R.B. v. Electric City Dyeing Co.*, *supra* [178 F. 2d 980 (C.A. 3)]. This rule, however, is necessarily limited where an employee is engaging in activities protected by the Act. * * * To adopt petitioner's view would materially weaken the guarantees of the Act, for the extent of employees' protected rights would be made to vary with the state of the employer's mind. We conclude that if the conduct giving rise to the employer's mistaken belief is itself protected activity, then the employer's erroneous observations cannot justify the discharge.

Accord: Salt River Valley Water Users' Association v. National Labor Relations Board, 32 LRRM 2598, 2601 (C.A. 9, July 23, 1953).

its discrimination, its "only interest" being its "normal and understandable desire to avoid making payments which [it] felt [it] was not legally obligated to make." (Br. for Gaynor, p. 14.) But if the standard for differentiation which it adopted constituted "discrimination in employment" within the meaning of Section 8(a)(3)—the critical issue—then the Company's claim of innocent intention reduces to the assertion that it was economically more profitable for it to operate in disregard of its statutory obligation than in conformity with it. In this sense the Company's motive is not different from that of most offenders. It is the rare person who is activated by unalloyed animus rather than by a desire to promote his economic interests. We therefore grant that the Company's purpose was to save money rather than to encourage union membership as such; but this is hardly an extenuating motive if its method of saving money otherwise offends the requirements of Section 8(a)(3).

Implicitly recognizing that an employer may unlawfully encourage union membership by forbidden discrimination under Section 8(a)(3) even though it is not the purpose or desire of the employer to accomplish such encouragement, Congress, in Section 8(b)(2) of the amended Act, made it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *." As we have shown in our original brief in the *Teamsters* case (pp. 12-26), Congress was concerned in this provision with what it regarded as excessive and abusive control by unions over employment through enforcement

of closed-shop agreements. Relevant at the moment is the recognition by Congress of the well-known fact that employers have frequently been forced in the exigencies of bargaining or by other pressure to yield to unions such control over employment. Congress knew, in a word, that employers could be "caused" "to discriminate against an employee in violation of subsection (a)(3) * * *." And this without regard to whether the employer wished—had as his own purpose—to encourage union membership. Because the employer's subjective attitude is not the material issue, Congress aptly described the employer conduct a union was forbidden to cause as *discrimination* "in violation of subsection (a)(3)"—*i. e.*, discrimination which is based upon union membership or activity and which results in fact in encouragement or discouragement of membership.

III

In Any Event, a Purpose To Encourage Membership in a Labor Organization Was Established in *Radio Officers and Teamsters*

A. In Both Cases the Labor Organizations Had the Purpose of Encouraging Membership in Good Standing

In our brief in *Teamsters* (pp. 28-36), we showed that the term "membership in any labor organization" embraces membership in good standing,⁹ a status which is maintained by the faithful

⁹ Thus, the House Report stated that "The bill prohibits what is commonly known as the closed shop, or any form of compulsory unionism that requires a person to be a member of a union *in good standing* when the employer hires him." H. Rep. No. 245, 80th Cong., 1st Sess., p. 33 (emphasis supplied).

performance of membership obligations. See also, *National Labor Relations Board v. Bell Aircraft Corp.*, 32 LRRM 2550, 2553 (C. A. 2, Aug. 11, 1953). In both *Radio Officers* and *Teamsters*, where the labor organizations were found to have violated Section 8(b)(2) by causing the employers to discriminate in violation of Section 8(a)(3), the palpable purpose of the labor organizations' conduct was to encourage membership in good standing. In *Radio Officers*, a prerequisite for maintaining membership in good standing was compliance with the labor organization's rule prescribing the method of hiring to be followed by a member in obtaining work, and the sanction imposed on a member for breach of this rule was refusal to clear him for employment with the Company. In *Teamsters*, a prerequisite for maintaining membership in good standing was timely payment of union dues, and the sanction imposed for a member's breach of this rule was reduction in his seniority. In each case, therefore, the plain purpose of the labor organization's conduct was to encourage membership in good standing, for in imposing a sanction for the breach of a membership rule there can be no other intent than to encourage membership in good standing.

It may be urged that it is not enough to show that the labor organization entertained the proscribed purpose: The offense under Section 8(b)(2) is for the labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)"; accordingly, the argument might run, the labor

organization's liability depends on a violation of Section 8(a)(3), which cannot be effected unless the employer himself entertains the proscribed purpose. Compare pp. 12-13, *supra*. This would be a stultifying interpretation in terms of the evil at which Congress aimed. If the mischief to be corrected is purposeful encouragement of membership by discrimination in employment, that mischief is fully manifested if the labor organization alone entertains the prohibited purpose; its impact is not diminished because the employer as the instrument by which the union effects its end does not share the union's purpose. The employer's lack of purpose might, we assume here, be a defense to him if he is charged with a violation of Section 8(a)(3), but even as a matter of the most literal reading of Section 8(b)(2), this would still leave the labor organization chargeable with an "attempt to cause" a Section 8(a)(3) violation. A finding of an 8(b)(2) violation on the footing of an "attempt" would still require the labor organization fully to remedy whatever harm its "attempt" caused.

Furthermore, it is not even true that the employer under these circumstances is not chargeable with a violation of Section 8(a)(3). With knowledge or reason to know the basis of the union's request, the employer has the choice of either acquiescing in the request—thereby promoting purposeful encouragement of membership—or of resisting the request—thereby safeguarding the employee's interests. When the employer acquiesces, he aids in effectuating the union's purpose to the detriment of the employee's interests, however

reluctant, unenthusiastic, or constrained he may feel. The employer may have "had no purpose—in the sense of animus or desire—to injure one or to help the other" (*National Labor Relations Board v. Gluek Brewing Co.*, 144 F. 2d 847, 853 (C.A. 8)), but it is the settled rule, from which no court has deviated, that an employer's acquiescence in a union's request, even under the compulsion of economic pressure, does not relieve the employer of responsibility (*supra*, pp. 10-12). Unless this rule is to be undone, the employer does violate Section 8 (a) (3) (see *Eichleay Corp. v. National Labor Relations Board*, 32 LRRM 2628, 2631-34 (C.A. 3, August 26, 1953), and the union cannot therefore plead the absence of a violation on the employer's part as a defense to a charge that it has violated Section 8 (b) (2).

B. Enforcement of an Agreement Conditioning Employment on Union Membership, when the Action Taken Is in Excess of That Permitted by the Agreement, Constitutes a Violation of Section 8 (a) (3) and 8 (b) (2) without a Showing that the Individual Act of Enforcement Had the Specific Purpose of Encouraging Membership

There is an additional ground in *Radio Officers*, still assuming a purpose requirement, for holding that the labor organization violated Section 8 (b) (2). The agreement between the Company and the Union conditioned employment on union membership in good standing, and the discrimination practiced by the Union was in excess of that per-

mitted by this agreement. (Bd. brief in *Radio Officers*, pp. 26-34.) When enforcement of such an agreement goes beyond what its terms authorize, the action taken violates Section 8 (a) (3) and 8 (b) (2) without the need for showing that the individual act of enforcement had the specific purpose of encouraging union membership.

When Congress made it an unfair labor practice "by discrimination in * * * employment * * * to encourage * * * membership in any labor organization," Congress was aware that it invalidated any system of employment in which hire or tenure was conditioned on union membership, for the manifest objective of such an arrangement is to encourage membership. (Board brief in *Radio Officers*, pp. 21-26.) To save such arrangements from total invalidation, Congress inserted provisos in both Section 8 (3) of the original Act and Section 8 (a) (3) of the amended Act permitting under specified limitations the "making" of an agreement conditioning employment on union membership. If the "making" does not comply with the specified limitations, the mere execution of such an agreement without more violates Section 8 (a) (3) and 8 (b) (2). *Red Star Express v. National Labor Relations Board*, 196 F. 2d 78, 81 (C.A. 2); *National Labor Relations Board v. F. H. McGraw & Co.*, 32 LRRM 2220, 2225 (C.A. 6, June 4, 1953); *Eichleay Corp. v. National Labor Relations Board*, 32 LRRM 2628, 2632 (C.A. 3, August 26, 1953). Any supposed requirement that the execution of the agreement must be shown to have for its purpose encouragement of membership is satisfied by the very character of such agreements, which bear no rea-

sonable interpretation other than that their necessary effect of encouraging membership is their intended effect as well. A showing of specific intent underlying the particular agreement is not necessary. Specific intent is not requisite where the acts are "sufficient in themselves to produce a result which the law seeks to prevent" (*Swift & Co. v. United States*, 196 U. S. 375, 396)—in this case control over employment based on union membership except in compliance with the conditions Congress has laid down. Such agreements in effect confer a monopoly, and the law properly assumes that "no monopolist monopolizes unconscious of what he is doing." *United States v. Aluminum Company of America*, 148 F. 2d 416, 432 (C.A. 2).

Enforcement of a union-security agreement beyond what its valid terms permit stands on the same footing as the making of an invalid agreement in the first instance. Since Congress has made the validity of a union-security agreement depend "upon the existence of the conditions prescribed by the statute for giving such an agreement effect" (*Warehousemen's Union, Local 117 v. National Labor Relations Board*, 121 F. 2d 84, 87 (C.A. D.C.), certiorari denied, 314 U.S. 674), its valid enforcement likewise depends upon compliance with its terms. "For Congress had specified the precise manner and method of securing immunity. None other would suffice." *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 226-227.

IV

In *Radio Officers and Teamsters*, Even if the Labor Organizations Did Not Violate Section 8 (b) (2), the Conduct in Which They Engaged Nevertheless Violated Section 8 (b) (1) (A)

In the Board's briefs in *Radio Officers* (pp. 11, 35-36, 41-44) and *Teamsters* (pp. 7-8, 9, 43-44), we showed that, apart from whether the labor organizations had violated Section 8 (b) (2) of the Act, the Board properly found that the conduct in which they engaged was independently violative of Section 8 (b) (1) (A).¹⁰

The basis for the Board's holding that the labor organizations violated Section 8 (b) (1) (A), whether or not they also violated Section 8 (b) (2), may be summarized as follows: Section 8 (b) (1) (A) makes it an unfair labor practice for a labor organization "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *." Section 7 of the Act guarantees employees the right "to refrain" from assisting labor organizations or engaging in concerted activities for mutual aid or protection except as the right to refrain is limited by a valid union-security agreement. In *Teamsters*, no valid union-security agreement existed; in *Radio Officers*, the action taken was unauthorized by the union-security

¹⁰ In *Gaynor*, the Board found that the Company violated Section 8 (a) (3) of the Act, "thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1) of the Act" (R. 29). Since the Board's finding of an 8 (a) (1) violation is thus dependent on its finding of an 8 (a) (3) violation, we do not discuss whether in *Gaynor*, apart from its violation of 8 (a) (3), the Company independently violated 8 (a) (1).

agreement; in both cases, therefore, abridgment of the right to refrain was not privileged by an agreement. In *Teamsters*, the employee failed to pay his union dues on time and to that extent refrained from assisting the labor organization; the reduction in his seniority for delinquency in paying his dues was restraint and coercion of him in exercising his right to refrain. In *Radio Officers*, the employee failed to comply with the union's rule concerning the method of obtaining employment and to that extent refrained from assisting the labor organization or engaging in its concerted activities; the refusal to clear the employee for employment with the Company because of his conduct was restraint and coercion of him in exercising his right to refrain. In both cases, therefore, the labor organizations violated Section 8 (b) (1) (A) of the Act independently of whether they also violated Section 8 (b) (2).¹¹

The soundness of this analysis is squarely supported by the recent decision of the Court of Appeals for the Ninth Circuit in *National Labor Relations Board v. George W. Reed, et al.*, 32 LRRM 2308 (C.A. 9, June 22, 1953). The Ninth Circuit

¹¹ However, if the labor organization's conduct falls only within the prohibition of Section 8 (b) (1) (A), the orders entered by the Board appear to require refashioning insofar as their provisions are addressed to violations of Section 8 (b) (2). In *Teamsters*, this would mean that part 1(a) and (b) of the Board's order (R. 16) should be reworded to eliminate the portions based on Section 8 (b) (2). In *Radio Officers*, part 1(a) of the decree below (R. II, 90), which corresponds to part 1(a) of the Board's order (R.I., 29), would be deleted. In both cases, the notices to be posted would be correspondingly modified (*Teamsters*, R. 21; *Radio Officers*, R. I., 38, R. II, 92).

stated the pertinent facts in that case to be that (32 LRRM at 2311):

Ernest Sydney Charlton, for almost fifty years, has been and still is a member of the respondent Union (International Hod Carriers, Building & Common Laborers Union). In 1949, he was hired by [the employer] Reed as a hod-carrier without first getting clearance from his Union, despite his knowledge of the Union rule requiring him to do so. When the Union discovered his breach, it threatened to take all the hodcarriers off the job unless Reed discharged Charlton. Reed bowed to the Union's demand although he had entered into no union-security contract with the Union.

Evidently following the reasoning of the Eighth Circuit in *Teamsters*, the Ninth Circuit held that these facts failed to support the Board's findings that the employer had violated Section 8 (a) (3) and the union Section 8 (b) (2), for "the record shows that Charlton [the employee] was already a Union member and that the discharge caused no change in his Union status."¹² 32 LRRM at 2312. The Ninth Circuit nevertheless held that these facts supported the Board's independent findings that

¹² In the Board's brief in *Teamsters* (pp. 27-43), we have sought to show the fallacy of this approach, which, to summarize, consists of (1) the failure to apprehend that "membership in any labor organization" as used in Section 8 (a) (3) embraces membership in good standing; (2) the failure adequately to evaluate the influence on joining and remaining in a union which is exerted by the union's display of its power over employment; and (3) the failure to appreciate that only a tendency to induce or dissuade from membership need be shown, not an actual change in the union status of any particular employee.

the employer had violated Section 8 (a) (1) and the union Section 8 (b) (1) (A). It explained that (32 LRRM at 2312):

Section 8 (a) (1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7. And Section 8 (b) (1) (A) makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce" employees in the exercise of their rights under Section 7. Among the rights guaranteed by Section 7 are: the right to self-organization and to form, join, or assist labor organizations, and "the right to refrain from any or all of such activities except to the extent that such right may be affected by any agreement requiring membership in a labor organization as a condition of employment" as authorized by Section 8 (a) (3).

Since no union-security agreement was in effect between Reed and the Union under the provisions of Sections 7 and 8 (a) (3) at the time of Charlton's discharge, his employment by Reed must in no way depend upon his Union status. For, to the extent that Charlton disobeyed the Union's rules, he was refraining from assisting a labor organization. His right to so conduct himself without fear of losing his job is guaranteed by Section 7. Accordingly, the finding of the Board that the Union, in securing Charlton's discharge, and Reed, in firing Charlton for failure to obey Union rules, was a violation of Section 8 (a) (1) and 8 (b) (1) (A) in that they coerced him in the exercise of his rights guaranteed by

Section 7, is supported by the law and the facts. Whether the coercion was or was not successful in accomplishing its object ¹⁷ [I.e., compliance with union clearance rules] is irrelevant. Its use was sufficient to constitute an unfair labor practice.

Thus, insofar as a violation of Section 8 (b) (1) (A) is concerned, the Ninth Circuit's decision in *Reed* is on all fours with the Board's position in *Radio Officers and Teamsters*.

Assuming it to be true (as we shall show is not the case) that a purpose to restrain or coerce employees is essential to a Section 8 (b) (1) (A) violation, the labor organizations in *Radio Officers* and *Teamsters* unquestionably had the requisite purpose. In both cases the employees failed to adhere to the union rules, and the sanctions visited upon them had the precise purpose of punishing the past default and of constraining future obedience.

But even if that were not the purpose, it would make no difference. For in Section 8 (b) (1) (A) Congress was concerned with safeguarding employees from conduct which abridges their exercise of guaranteed rights, whatever the motive for the infringement. This was settled in *Republic Aviation Corporation v. National Labor Relations Board*, 324 U.S. 793, ¹³ insofar as acts by an employer "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed

¹³ In the Board's brief in *Gaynor* (pp. 25-27), we showed that another part of the decision in *Republic Aviation* makes it clear that purposeful encouragement or discouragement of union membership need not be shown to make out a violation of Section 8 (a) (3).

in section 7" in violation of Section 8 (a) (1) of the Act (then Section 8 (1)); and on this subject there is no relevant difference between interference, restraint, and coercion by an employer and restraint and coercion by a labor organization. In *Republic Aviation*, the employer adopted a rule against any solicitation on its premises and, "without any animus against unions, general or particular,"¹⁴ enforced the rule impartially against solicitation of union membership within the plant during nonworking time. And so the question emerged whether such a rule, to which "no union bias or discrimination by the company" attached (324 U.S. at 797), was of itself an abridgment of the employee's organizational rights. This Court held the rule invalid, despite the absence of any purpose on the part of the employer to use the rule to deter organization, for the issue was conceived to be one of "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." *Id.* at 797-798. Considered in that light, the question was whether the rule could be squared with the "right of employees to organize for mutual aid without employer interference" (324 U.S. at 798); since the "rule against solicitation was considered inimical to the right of organization" (324 U.S. at 801), it did not matter that the employer's purpose in promulgating it was benign. Thus the "test of in-

¹⁴ The quoted statement is from the Second Circuit's decision affirmed by this Court in *Republic Aviation*, 142 F. 2d 193, 195.

terference, restraint and coercion under § 8 (1) of the Act [now Section 8 (a) (1)] does not turn on the employer's motive * * *." ¹⁵ *National Labor Relations Board v. Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7). Neither does the test of restraint and coercion under Section 8 (b) (1) (A) turn on the labor organization's motive.

CONCLUSION

It is respectfully submitted that the decisions below in *Radio Officers* and *Gaynor* should be affirmed and the decision below in *Teamsters* reversed.

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SEPTEMBER, 1953.

¹⁵ Similarly, as to a violation of Section 8 (a) (2), the employer's "good motives" are immaterial. *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 251.